A

Public Prosecutor v Teong Lung Chiong & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–58 OF 2002(Q)

B

RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND AZMEL FCJJ

8 FEBRUARY 2010

C

Criminal Law — Penal Code — s 34 — Common intention — Respondents jointly charged for murdering deceased in furtherance of common intention — Whether prosecution had to show which respondent actually killed deceased

D

Criminal Procedure — Appeal — Acquittal, against — Respondents acquitted of murder — Whether cautioned statement tantamount to confession of murder — Availability of circumstantial evidence independent of cautioned statements to support conviction of murder — Whether prosecution proved case beyond reasonable doubt

E

Criminal Procedure — Statements — Cautioned statements — Whether cautioned statements amounted to confessions — Evidence Act 1950 s 30

F

Evidence — Statement — Cautioned statement — Whether cautioned statements amounted to confessions — Evidence Act 1950 s 30

The respondents were charged with murder, in that they had in furtherance G of a common intention caused the death of one Hew Leh Poh (f), an offence punishable under s 302 of the Penal Code ('the Code') read with s 34 of the same Code. The deceased was last seen by her father on 14 July 1991 at about 2pm walking home from the noodle stall operated by her parents. When she failed to reach home at about 6pm her family began to look for her. On 17 H September 1991, a letter was received demanding the payment of RM10,000 for the safe return of the deceased. On 19 September 1991 a second letter was received demanding payment to be sent to one Steven Ting of PO Box 947, 96000 Sibu. Subsequently a third letter was received on 29 September 1991 together with short flowery pants belonging to the deceased. By then the I ransom demanded had gone up to RM15,000. On 4 October 1991, on the advice of the police a sum of RM3,000 together with a letter was delivered to the General Post Office Sibu at PO Box 947, 96000 Sibu addressed to one Steven Ting. The police set up observation. On 6 October 1991, the first respondent came to pick up the money. This fact was not denied by the first

respondent. He also admitted writing the letters including sending the flowery pants. The first respondent was then trailed by the police for the next one week before arresting him on 14 October 1991. The arrest of the first respondent led to the discovery of the skeletal remains of the deceased. Subsequently other respondents were arrested. The trial was before the learned High Court judge aided by two assessors. Concurring with the opinions of the assessors, the learned judge convicted the respondents for the offence of murder and sentenced each of them to death. The respondents appealed to the Court of Appeal. In allowing the appeals the Court of Appeal held that the trial judge erred in construing the respective cautioned statements of the respondents as confessions for murder when they were not and invoked s 30 of the Evidence Act 1950 ('the Act'). The Court of Appeal also held that even assuming that the cautioned statements amounted to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder. The appellant/prosecution appealed to the Federal Court on the following grounds: (i) the first issue — grounds 9 and 10 — that the learned trial judge did not rely on s 30 in convicting the respondents; (ii) the second issue — grounds 5 and 12 — that there was common intention both to rape and murder the deceased; (iii) the third issue — ground 6 — that there was no necessity to identify who was the actual doer of the offence; (iv) the fourth issue — grounds 7 and 8 — that confession of the co-accused; (v) the fifth issue — ground 11 — whether s 30 of the Act was applicable; and (vi) the sixth issue — grounds 1, 2, 3 4 — that there were unimpeached circumstantial evidence connecting all the respondents to the crime of murder.

Held, allowing the appeal:

(1) Where a cautioned statement is used in a trial with the aid of assessors it is for the assessors to consider the issue of the truthfulness and whether any, and if so, what weight and effect to place on the cautioned statement, regard being had to the character of the cautioned statement, the circumstances leading to its making and the circumstances in which it was made. Whether the cautioned statements amounted to confessions for murder was a question of fact and within the realm of the assessors since their admissibility had already been dealt with by the trial judge. There was no finding by the Court of Appeal that the assessors were misdirected on these issues (see paras 42–43).

(2) The trial judge was correct in holding that although the respondents in their cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents. The respondents were jointly charged in furtherance of a common intention for the murder of the deceased with specific

reference to s 34 of the Code. As to which of them did the actual killing was immaterial (see paras 47 & 52).

(3) There were ample circumstantial evidence relevant and implicating the respondents to the murder of the deceased. In addition, the respondents in their respective cautioned statements admitted raping the deceased and further admitted that they had every reason not to let her escape otherwise they would be in trouble. By themselves, those pieces of evidence might not be sufficient to convict the respondents of the crime they were charged but when combined with the cautioned statements of the respondents either taken individually or by invoking s 30 of the Act, it would undoubtedly confirm the guilt of the respondents beyond reasonable doubt (see paras 57–59).

(4) It is a question of fact whether an act or acts of one or more accused persons in committing an offence was or were done in furtherance of a common intention of all the accused persons. On this issue the assessors had given their affirmative finding of fact and concurred by the trial judge. An appellate court should be slow in interfering in the finding of fact of a trial court (see para 62).

[Bahasa Malaysia summary

Responden-responden dituduh membunuh, di mana mereka, bagi mencapai niat mereka yang sama menyebabkan kematian seorang yang bernama Hew Leh Poh (f), satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun') di baca bersama s 34 Kanun yang sama. Si mati akhir sekali dilihat oleh bapanya pada 14 Julai 1991 lebih kurang pada 2 petang berjalan pulang ke rumah daripada gerai mi yang diusahakan oleh ibu bapanya. Apabila dia gagal sampai ke rumah pada lebih kurang pukul 6 petang keluarganya mula mencarinya. Pada 17 September 1991, sepucuk surat diterima menuntut pembayaran sejumlah RM10,000 jika mahukan si mati selamat pulang. Pada 19 September 1991 surat kedua diterima menuntut bayaran dihantar kepada seseorang bernama Steven Ting di alamat PO Box 947, 96000 Sibu. Kemudian surat ketiga diterima pada 29 September 1991 bersama-sama dengan seluar pendek berbunga kepunyaan si mati. Pada masa itu wang tebusan yang dituntut telah meningkat kepada RM15,000. Pada 4 Oktober 1991, atas nasihat polis sejumlah RM3,000 bersama-sama dengan sepucuk surat dihantar ke Pejabat Pos Awam Sibu di PO Box 947,96000 Sibu dialamatkan kepada Steven Ting. Polis membuat pemerhatian. Pada 6 Oktober 1991, responden pertama datang untuk mengambil wang tersebut. Fakta ini tidak dinafikan oleh responden pertama. Dia juga mengakui menulis surat-surat tersebut termasuk menghantar seluar bercorak bunga tersebut. Responden pertama kemudian telah diekori oleh polis selama seminggu seterusnya sebelum menangkapnya pada 14 Oktober 1991. Penangkapan responden pertama membawa kepada penemuan mayat si mati. Kemudian responden-responden lain ditangkap. Perbicaraan

dijalankan di hadapan hakim Mahkamah Tinggi dibantu oleh dua orang pengapit hakim. Bersetuju dengan pendapat pengapit-pengapit tersebut, hakim yang bijaksana mensabitkan responden-responden bagi kesalahan membunuh dan menghukum setiap seorang dengan hukuman mati. Responden-responden merayu ke Mahkamah Rayuan. Dalam membenarkan rayuan-rayuan tersebut, Mahkamah Rayuan memutuskan bahawa hakim bicara terkhilaf dalam mentafsir kenyataan beramaran masing-masing oleh responden-responden sebagai pengakuan terhadap pembunuhan apabila kenyataan tersebut sebenarnya bukanlah pengakuan dan membangkitkan s 30 Akta Keterangan 1950 (Akta'). Mahkamah Rayuan juga memutuskan bahawa walaupun menganggap bahawa kenyataan beramaran tersebut membentuk pengakuan terhadap pembunuhan, perlu ada keterangan lain yang bebas daripada kenyataan beramaran tersebut yang mencukupi untuk menyokong sabitan bagi pembunuhan. Perayu/pihak pendakwaan merayu ke Mahkamah Persekutuan atas alasan-alasan berikut: (i) isu pertama — alasan 9 dan 10 — bahawa hakim bicara yang bijaksana tidak menyandar atas s 30 dalam mensabitkan responden-responden; (ii) isu kedua — alasan 5 dan 12 — bahawa terdapat niat bersama untuk merogol dan membunuh si mati; (iii) isu ketiga — alasan 6 — bahawa tidak ada keperluan untuk mengenalpasti siapa sebenarnya pembuat kesalahan tersebut; (iv) isu keempat — alasan 7 dan 8 — bahawa pengakuan tertuduh bersama; (v) isu kelima — alasan 11 — sama ada s 30 Akta tersebut beraplikasi; dan (vi) isu keenam — alasan 1, 2, 3 dan 4 — bahawa terdapat keterangan ikut keadaan yang tidak dicabar mengaitkan kesemua responden terhadap jenayah membunuh.

Diputuskan, membenarkan rayuan:

(1) Di mana kenyataan beramaran digunakan dalam perbicaraan dengan bantuan pengapit hakim, adalah untuk pengapit hakim mempertimbangkan isu kebolehpercayaan dan sama ada apa-apa, dan jika ada, apakah beban dan kesan yang perlu diberi kepada kenyataan beramaran, mempertimbangkan sifat kenyataan beramaran tersebut, hal keadaan yang membawa kepada pemberiannya dan keadaan di mana ia dibuat. Sama ada kenyataan beramaran bermaksud pengakuan terhadap pembunuhan adalah persoalan fakta dan terangkum dalam bidang kuasa pengapit hakim kerana kebolehterimaannya telah pun dipertimbangkan oleh hakim bicara. Tidak ada penemuan oleh Mahkamah Rayuan bahawa pengapit-pengapit tersebut telah tersalah arah dalam isu-isu ini (lihat perenggan 42–43).

(2) Hakim bicara adalah betul dalam memutuskan bahawa walaupun responden-responden di dalam kenyataan beramaran telah menyalahkan sesama sendiri sebagai orang yang sebenarnya mencekik si mati, fakta adalah bahawa si mati telah dicekik sehingga mati oleh tindakan atau tindakan-tindakan oleh salah seorang atau lebih atau kesemua responden. Responden-responden adalah dituduh bersesama

bagi mencapai niat mereka yang sama untuk membunuh si mati dengan rujukan spesifik kepada s 34 Kanun tersebut. Siapa di antara mereka yang sebenarnya melakukan tindakan membunuh adalah tidak penting (lihat perenggan 47 & 52).

(3) Terdapat keterangan hal keadaan yang mencukupi yang relevan dan membabitkan responden-responden terhadap pembunuhan si mati. Tambahan pula, responden-responden di dalam kenyataan beramaran masing-masing mengakui merogol si mati dan selanjutnya mengakui bahawa mereka mempunyai banyak alasan untuk tidak membiarkan si mati terlepas, kerana jika terlepas mereka akan menghadapi masalah. Dengan sendirinya, keterangan-keterangan tersebut mungkin tidak mencukupi untuk mensabitkan responden-responden bagi jenayah yang dituduh tetapi apabila digabungkan dengan kenyataan beramaran responden-responden sama ada secara individu atau dengan membangkitkan s 30 Akta tersebut, tanpa ragu-ragu akan mengesahkan kesalahan responden-responden melampaui keraguan munasabah (lihat perenggan 57–59).

(4) Adalah persoalan fakta sama ada sesuatu tindakan atau tindakan-tindakan salah seorang atau lebih daripada seorang tertuduh di dalam melakukan kesalahan adalah dilakukan bagi mencapai niat mereka yang sama kesemua tertuduh. Atas isu ini pengapit-pengapit hakim telah memberikan penemuan yang mengesahkan terhadap fakta dan dipersetujui hakim bicara. Mahkamah rayuan sewajarnya tidak campur tangan dalam penemuan fakta oleh mahkamah bicara (lihat perenggan 62).]

Notes

For cases on acquittal, against, see 5 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 141–162.

For cases on cautioned statements, see 5 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4365–4372.

For cases on cautioned statement under evidence, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2492–2511.

For cases on s 34 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1267–1284.

Cases referred to

Board of Trustees of the Sabah Foundation & Ors, The v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469, FC (refd)

Chin Seow Noi & Ors v PP [1994] 1 SLR 135, CA (refd)

Juhari bin Ibrahim v PP [1973] 1 MLJ 76, FC (refd)

Kuan Ted Fatt v PP [1985] 1 MLJ 211, FC (refd)

Noliana bte Sulaiman v PP [2000] 4 MLJ 752, HC (refd)

Ong Chee Hoe & Anor v PP [1999] 4 SLR 688, CA (folld)

Prasong Bunsom & Ors v PP [1995] 3 SLR 433, CA (refd)
Sabaee bin Bujang v PP [2006] 2 MLJ 627, CA (refd)

Legislation referred to

Evidence Act 1950 s 30
Penal Code ss 34, 302
Rules of the Federal Court 1995 r 137

Appeal from: Criminal Appeal Nos Q-05–20 of 1996 and Q-05–21 of 1996 (Court of Appeal, Putrajaya)

Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant/prosecution.
Augustine Liom (Tang & Co) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak):

PRELIMINARIES

[1] In our oral decision delivered on 20 November 2007 we unanimously allowed the appeal by the appellant/prosecution. We thus set aside the order of the Court of Appeal and restored the convictions and sentences imposed upon the respondents by the learned High Court trial judge.

[2] Subsequently the respondents filed an application under r 137 of the Rules of the Federal Court 1995 to review our decision. We now give the reasons for our decision.

[3] The charge preferred against the respondents and another fourth accused was for murder. The charge read that on 14 July 1991 between 2pm and 5pm in a hut at 8 1/2km, Teku Road, Sibu, in the State of Sarawak, in furtherance of the common intention of them all they caused the death of Hew Leh Poh (f), an offence punishable under s 302 of the Penal Code read with s 34 of the same Code.

[4] At the close of the case for the prosecution the fourth person charged was discharged and acquitted without his defence being called.

[5] It was the case for the prosecution that the victim, Hew Leh Poh (f) (deceased) was 13 years old at the time of the incident. She was last seen by her father on 14 July 1991 at about 2pm. She was walking home from the noodle stall operated by her parents. When she failed to reach home at about 6pm her family began to look for her.

[6] After searching for two days the family did not find the deceased. Her father therefore lodged with the police a missing person report (exh P8).

[7] For the next two months the deceased was still not found. Then on 17 September 1991 PW8, the sister of the deceased, received a letter (exh P11) addressed to her demanding the payment of RM10,000 for the safe return of the deceased.

[8] On 19 September 1991 a second letter (exh P12) was received by PW8. It stipulated that the payment was to be sent to one Steven Ting of PO Box 947, 96000 Sibu. The currency denominations were prescribed to be in Malaysian Ringgit 500 and 1000 and old currency preferred.

[9] Subsequently a third letter was received on 29 September 1991 together with short flowery pants (exh P13) identified by PW8 as belonging to the deceased. By then the ransom demanded had gone up to RM15,000.

[10] On 4 October 1991 and on the advice of the police a sum of RM3,000 together with a letter was delivered to the General Post Office Sibu at PO Box 947, 96000 Sibu addressed to one Steven Ting. From that moment onwards the police set up observation points to see who would come to collect the money from the General Post Office.

[11] Then on 6 October 1991 at about 9am the first respondent came to pick up the money from its location at the General Post Office riding a motorcycle bearing registration No SE 7430. We noted that this fact was not denied by the first respondent. He also admitted writing the letters to PW8 including sending the flowery pants. He gave his reasons for doing so in his defence.

[12] The first respondent was then trailed by the police for the next one week before arresting him on 14 October 1991.

[13] The arrest of the first respondent led to the discovery of skeletal remains of a human being which was subsequently confirmed to be that of the deceased Hew Leh Poh based on the findings of her ring and sandals she was last seen wearing before her disappearance.

[14] The forensic pathologist in her report stated that the cause of death was 'indeterminable but the ligature with reap knot suggests strangulation'.

[15] Subsequent to the arrest of the first respondent and the discovery of the human remains the second respondent was arrested on 15 October 1991

around 3am while the third respondent was arrested at about 10am on the same day.

BEFORE THE HIGH COURT

[16] The trial was before the learned High Court trial judge (learned trial judge) aided by two assessors.

[17] Upon conclusion of the hearing the learned trial judge summed up the case in detail to the two assessors. In his summing up the learned trial judge, inter alia:

(a) informed the assessors that they were to consider some questions on specific issues of facts relevant to the charge;

(b) advised the assessors that in arriving at their decisions or conclusions on matters of facts they must do so based only on the evidence that have been presented before them in the course of the trial; and

(c) that they must not take into account or be in any way swayed or influenced by any extraneous matters or rumours or things that they might have heard outside the court or of which might otherwise have become aware outside the court concerning the case before they came to court.

[18] On completion of the summing up the assessors took time to deliberate on the case. Subsequently they gave their opinions on the factual aspects of the case guided by the set of questions posed to them by the learned trial judge.

[19] The learned trial judge concurred with the opinions of the assessors. He thus proceeded to convict the respective respondents for the offence of murder and sentenced each one of them to death as stipulated under s 302 of the Penal Code ('the Code') read with s 34 of the same Code.

[20] Briefly in his judgment the learned trial judge agreed with the factual findings and opinions of the assessors that the prosecution had proved beyond reasonable doubt that:

(a) the deceased had died on the date, time and place as in the charge;

(b) the death of the deceased was caused by the act or acts of one or more or all of the accused;

(c) the act or acts was or were done with the clear intention of causing death to the deceased; and

(d) the act or acts of one or more or all of the accused which caused the death of the deceased was or were done in furtherance of a common intention of all the accused.

[21] In his judgment the learned trial judge expressed his concurrence with the factual findings and opinions of the assessors. He went on to say that although the respondents in their respective cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents.

[22] When considering whether the act or acts of one or more or all of the respondents which caused the death, was or were done in furtherance of the common intention of all of them, the learned trial judge, as in his summing up to the assessors, was very careful in his approach in relation to the respective cautioned statements of the respondents. He said that it was necessary to look, examine and consider the cautioned statements (exhs P77, P78 and P79) quite independently of each other. With such precaution in his mind the learned trial judge noted that the cautioned statements disclosed why and how the deceased was killed. The reason for killing her was to avoid any trouble with the police due to the rape. Hence, the deceased was slowly strangled with a nylon rope. In his cautioned statement the first respondent even said that it took 15–20 minutes for the deceased to die. Thereafter all the respondents worked together to dispose of her body.

[23] In his concluding remark the learned trial judge said that on the evidence, facts and law and for the reasons he gave, he found the defence had not 'raised or created any doubt as to the truth of the prosecution's case or as to the guilt' of the respondents and that he found that the prosecution had 'proved beyond reasonable doubt all the essential elements of the charge' against the respondents.

BEFORE THE COURT OF APPEAL

[24] The respondents appealed to the Court of Appeal. In allowing the appeals the Court of Appeal said this:

> A scrutiny of the judgment reveals that the learned judge had gathered the common intention to murder the deceased by inferences, mainly, from (i) the conduct of each appellant in not preventing the others from strangling the deceased to death but simply watching the deceased being slowly strangled and choked to death, (ii) the fact that the deceased was earlier raped by each of them and that they would be in trouble if they were to let the deceased free and therefore, there was a need to kill the deceased and (iii) their participation in actively assisting each other in the clumsy disposal of the deceased's body. *Although*

the learned judge did not categorically indicate that he applied the provisions of s 30 of the Evidence Act 1950 ('the Act'), in reality, he took into consideration the contents of each of the cautioned statements as confession as against the other appellants.

In our view, with due respect, the learned judge erred in his approach leading to the conviction on the following grounds:

> Firstly, *the cautioned statement of each appellant does not tantamount to confession of murder*, though in the cases of the second and third appellants they are a confession to having committed rape on the deceased. Therefore, *they are not a confession for the offence of murder as charged to merit any consideration under s 30 of the Act*. Secondly, *even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder*. In this case there was no such evidence. In respect of the first appellant, although there was evidence against him that he wrote the ransom notes, he was caught collecting part of the ransom money, part of which was subsequently found in his possession, and he cooperated with the police leading to the discovery of the deceased's bones and the arrest of the other appellants, to our mind, that evidence is not sufficient to found a conviction of murder against him. (Emphasis added.)

BEFORE THIS COURT

[25] Dissatisfied with the judgment of the Court of Appeal the appellant/prosecution appealed to this court on 12 grounds. The learned deputy public prosecutor in his submission categorised them thus:

(a) first issue — grounds 9 and 10 — the learned trial judge did not rely on s 30 of the Evidence Act 1950 in convicting the respondents;

(b) second issue — grounds 5 and 12 — there was common intention both to rape and murder the deceased Hew Leh Poh;

(c) third issue — ground 6 — there was no necessity to identify who is the actual doer of the offence;

(d) fourth issue — grounds 7 and 8 — confession of the co-accused;

(e) fifth issue — ground 11 — s 30 of the Evidence Act 1950 is applicable; and

(f) sixth issue — grounds 1, 2, 3 4 — there are un-impeached circumstantial evidence connecting all the respondents to the crime of murder.

[26] Before considering each of the issues posed we need to emphasise here that in this appeal the dissatisfaction of the appellant/prosecution was on the judgment of the Court of Appeal. Accordingly there was no necessity for us to address the remarks and assertions by learned counsel for the respondents

on the alleged shortcomings which occurred during the trial stage. Such points should have been canvassed before the Court of Appeal. In our view it would not be appropriate for this court when considering this appeal by the appellant/prosecution to revisit those points unless gross miscarriage of justice would be caused otherwise. In the present appeal we found none.

[27] Further, we pause to note that the Court of Appeal focused its attention on the judgment of the learned trial judge and merely paid lip-service to the fact that the trial was conducted with the aid of two assessors.

[28] It had been judicially stated that the role of assessors in a murder trial should not be misunderstood or overlooked. Assessors play an important and critical part on question of facts. In *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 this is what Seah FCJ had to say on the function of assessors at p 214:

> In our opinion, when the learned trial judge said to the assessors in his summing-up that 'In this trial, I am the sole judge of the law and you (assessors) are the sole judges of the fact …' he was merely describing the division of functions between a judge and assessors in a murder trial conducted under Chapter XXI of the Criminal Procedure Code (FMS Cap 6). Although the law allows the learned trial judge to disagree with what he regards as perverse the opinion of an assessor subject to his giving reason or reasons thereof, learned counsel for the appellant was unable to point out any passage or passages in the summing-up that the learned trial judge had usurped or attempted to usurp the function which is in the province of the assessors to determine. *In our judgment, the fact that the learned trial judge is not bound to conform to the opinions of the assessors or either of them, does not, derogate from the assessors their main function as arbiter of fact in a murder trial.* From the very name 'assessors' itself they are free to give their opinion on any particular issue of fact relevant to the charge which the learned judge may specify at the trial. (Emphasis added.)

[29] Assessors are therefore to consider the factual aspect of a case. However, in the present case we find that the Court of Appeal did not point out any misdirection committed by the learned trial judge in his summing up of the case to the assessors. There was also no finding or comment by the Court of Appeal that in his summing up to the assessors the learned trial judge erred in his narration and analysis of the evidence adduced or misdirected the assessors by remitting the cautioned statements of the respondents as part of the body of evidence for the case.

[30] And despite saying that there was no other evidence against the respondents other than their cautioned statements the Court of Appeal stopped short of saying that the defence of the respondents should not have

been called at the close of the case for the prosecution. Basically all it said was that the learned trial judge erred in considering the cautioned statements of the respondents as confessions and thus invoking, albeit indirectly, s 30 of the Evidence Act 1950 ('the Act').

[31] With respect we are of the view that the Court of Appeal took an over-simplistic approach in this case. It failed to consider the detailed summing up by the learned trial judge to the assessors who returned after deliberation with finding of facts. Such findings should not be casually ignored or interfered with by an appellate court. This is not a case of where it was alleged that the learned trial judge invited the assessors to make a particular finding of fact which would have amounted to misdirection (see *Juhari bin Ibrahim v Public Prosecutor* [1973] 1 MLJ 76).

[32] Moreover, the cautioned statements of the respondents were part and parcel of the evidence adduced. As such the assessors were very well-appraised of their evidential value by the learned trial judge in his summing up.

[33] For instance, this is what the learned trial judge said to the assessors, inter alia:

> ... He (Mr Tang, learned defence counsel for the respondents) further submits that even if the cautioned statements can be regarded as confessions of the accused persons, you, gentlemen assessors, have to look at them quite separately in determining the question of whether or not there was common intention on the part of the accused persons concerned and that the confessions of the other accused persons are merely to be used as corroboration. I will accept that as the correct statement of the law. This (is) provided for in s 30 of the Evidence Act. In other words, you have first and foremost to look at the confessions of the three accused persons, quite independently of each other and on that basis, you have to determine whether or not, there was common intention on the part of the accused persons to kill the girl by strangling her. The confessions of the co-accused persons could only be used as supporting evidence in each case.

[34] With respect we are therefore of the view that the Court of Appeal failed and thus erred when it came to its decision solely by scrutinising the judgment of the learned trial judge without taking into account that the trial was with two assessors. If it did the outcome of the appeal before it might have been different.

A THE ISSUES

First Issue — Grounds 9 and 10 — The learned trial judge did not rely on s 30 of the Evidence Act 1950 in convicting the respondents

Fourth Issue — Grounds 7 and 8 — Confession of the co-accused

B *Fifth Issue — Ground 11 — Section 30 of the Evidence Act 1950 is applicable*

[35] We now deal with the issues raised by the appellant/prosecution. We will deal first the above three issues together as they are interrelated.

C

[36] As indicated herein the crux of the judgment of the Court of Appeal is that the learned trial judge in his judgment erred in construing the respective cautioned statements of the respondents as confessions for murder when they were not and invoking s 30, albeit indirectly, of the Act. Further, it was held that even if the cautioned statements amounted to confessions D 'there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder' and in this case there was none.

E **[37]** Before us the learned deputy submitted that the learned trial judge did not expressly rely on s 30 of the Act when he considered the cautioned statements of the respondents. Instead he considered each cautioned statement separately and independently of each other.

F **[38]** Learned counsel for the respondents submitted otherwise. He contended that the Court of Appeal was correct in coming to its decision. Indeed before us the basic thrust of learned counsel for the respondents was in support of the decision of the Court of Appeal. He emphasised that the cautioned statements must amount to confessions before s 30 of the Act G could be invoked. He also raised some other issues in particular on the proceedings before the learned trial judge. We have already given our view hereinabove on this aspect of his submission.

[39] We have perused the judgment of the learned trial judge. We failed to H find any reference made by him to s 30 of the Act. On the contrary he said this:

> To ascertain whether the act or acts of one or more or all of the accused which caused the death, was or were done in furtherance of the common intention of all I of them, it is necessary to look, examine and consider the cautioned statements exhs P77, P78 and P79 quite independently of each other.

[40] Thus, if solely based on the judgment of the learned trial judge we would agree with the learned deputy that the Court of Appeal misdirected itself when it held that the learned trial judge applied s 30 of the Act when convicting the respondents.

[41] However, in his summing up as reproduced hereinabove the learned trial judge did mention s 30 of the Act to the assessors. What then was the significance of that reference when there was no mention in his judgment?

[42] In this case we do not think it made much difference. The reason is this. It is a principle of law that where a cautioned statement is used in a trial with the aid of assessors it is for the assessors to consider 'the issue of the truthfulness and whether any, and if so, what weight and effect to place on the cautioned statement, regard being had to the character of the cautioned statement, the circumstances leading to its making and the circumstances in which it was made. Over and above this, so as to satisfy themselves of its truthfulness', they could look for any corroborative evidence adduced (see *Sabaee bin Bujang v Public Prosecutor* [2006] 2 MLJ 627). There was no complaint on the manner in which the assessors were guided on the cautioned statements of the respondents before giving their opinions. Thus, there should be no question of misdirection.

[43] The Court of Appeal held that the cautioned statements of the respondents did not amount to confessions for murder. Whether or not they did, should remain a question of fact and within the realm of the assessors since their admissibility had already been dealt with by the learned trial judge. Again there was no finding by the Court of Appeal that the assessors were misdirected on the issue. Anyway we will consider further this issue later in this judgment.

[44] Quite apart, we would also say that the admitted cautioned statements of the respondents were 'evidence' before the learned trial judge and assessors. In *Noliana bte Sulaiman v Public Prosecutor* [2000] 4 MLJ 752 Augustine Paul J (as he then was) succinctly stated the principle when he said this at p 761:

> Thus an unsworn statement made by an accused from the dock, being matter before the court for consideration, will be 'evidence' contrary to what has been held in *Public Prosecutor v Sanassi* [1970] 2 MLJ 198 and *Lee Kong Yin v Public Prosecutor* [1970] 2 MLJ 205. Similarly the confession of a co-accused is entitled to due consideration like any other evidence that has been proved unlike its treatment in the Indian courts in view of their narrow definition of the word 'evidence' (see *Chin Seow Noi & Ors v Public Prosecutor* [1994] 1 SLR 135, *Abdul*

A *Rashid & Anor v Public Prosecutor* [1994] 1 SLR 119, *Lee Yuan Kwang & Ors v Public Prosecutor* [1995] 2 SLR 349 and *Public Prosecutor v Rozman bin Jusoh & Anor* [1995] 3 SLR 317).

B **[45]** Now, going into the specifics, there was no doubt that the deceased was killed in the presence of the respondents after she was raped by them. The reason for killing her was also given by the respondents in their respective cautioned statements, that is, to avoid trouble with the police due to the rape.

C **[46]** Who then amongst them actually killed the deceased? Based on the cumulative effect of the respective cautioned statements of the respondents, even when considered separately and independently in relation to the issue of common intention, and the other evidence adduced, circumstantial and otherwise, the responsibility should rest solely on all the respondents. There was no issue of alibi or that they had nothing to do with the killing. In fact all the cautioned statements mentioned that the deceased was strangled with a nylon string or rope in their presence and none of them did anything to stop it. In his cautioned statement the first respondent was in fact quite graphic on how the deceased died. It must have been a slow and painful death in that she was made to struggle for 15–20 minutes before breathing her last. There was also no issue that they all worked together to dispose of her body.

[47] The learned trial judge was therefore correct when he said in his judgment that although the respondents in their cautioned statements laid the blame for the actual strangling of the deceased on one another, the fact remained that the deceased was strangled to death by the act or acts of one or more or all of the respondents. And it should be noted that the respondents were jointly charged in furtherance of common intention for the murder of the deceased with specific reference to s 34 of the Code.

[48] Hence, we would think that it should not be so much as scrutinising the cautioned statements to find whether they contained individual and specific confessions by each of the respondents for murder. Rather their cumulative effect provided the evidence on the killing of the deceased.

[49] Accordingly, we are of the view that the Court of Appeal erred when it only focused for confessions in the cautioned statements and the application of s 30 of the Act instead of looking at the evidence adduced as a whole in the same way as the learned trial judge did.

[50] Anyway, we are also inclined to agree with the submission of the learned deputy on the applicability of s 30 of the Act. He rightly referred to the cases of *Prasong Bunsom & Ors v Public Prosecutor* [1995] 3 SLR 433 and *Chin Seow Noi & Ors v Public Prosecutor* [1994] 1 SLR 135. The latter case

has some similarities with the present case. Speaking for the Court of Criminal Appeal Singapore Yong Pung How CJ said this at p 151:

> We were of the view that the facts admitted by the second appellant in his s 121(1) statement gave rise sufficiently to the inferential admission that the deceased was murdered; that he was murdered by one or the other or both of the second and third appellants; and that the murder was in furtherance of the common intention of them both. Admission as to the element of common intention arose inferentially from his admission of the following facts: that the third appellant had bought a knife before the meeting with the deceased; that he (the second appellant) knew this; further that he (the second appellant) assumed that the knife would be brought along to the meeting, as shown by his answer to the first appellant when asked whether they were prepared. We found that the admission of guilt inferred was in no way weakened by the second appellant's claim that he had told the third appellant that killing was an offence and it was best not to kill the deceased. This was nothing more than a flimsy attempt to transfer all the blame on to the third appellant. As the Privy Council in *Anandagoda v The Queen* [1962] MLJ 289 pointed out, if the facts admitted in a statement add up to an express or inferred admission that the accused committed the essential elements of the alleged offence, then it is irrelevant that at the same time he loudly protests his blamelessness. In our view therefore, the s 121(1) statement of the second appellant amounted to a confession by him to the charge against him and was capable of being used in relation to the first appellant (and, for that matter, the third appellant) as far as s 30 of our Evidence Act allowed.

[51] Indeed on closer reading of the cautioned statement of the third respondent we agree with the contention of the learned deputy that he did confess that they would be in trouble if the deceased escaped. This is what the third respondent said, inter alia:

> She fell down. She got up and wanted to go out from the hut but Ah Ling pulled her back. Ah Chai said 'Don't let the girl escape, otherwise we will be in trouble!' Just then Ah Ling picked the nylon rope and put it round the girl's neck from behind. The girl struggled. Ah Chai and Ah Ling then pulled each end of the rope to strangle the girl's neck. *While this was done I also did say that we must not let the girl escape or else we were in trouble*. As such Ah Chai said 'If we want to finish her off we must do it now and all of us are responsible!' Then after struggling for a few minutes or (sic) being strangled with the rope by Ah Chai and Ah Ling, the girl finally fell down on the floor. Ah Chai checked and found that the girl was not breathing anymore. (Emphasis added.)

[52] Hence, all the respondents had every reason to kill the deceased. As to which of them did the actual killing is therefore quite immaterial. However, as gleaned from the cautioned statement of the third respondent he implicated the first and second respondents as the persons who did the act or acts of killing the deceased.

[53] Thus, even if s 30 of the Act was impliedly invoked by the learned trial judge as perceived by the Court of Appeal such reliance would have been justified in law.

[54] The foregoing therefore disposes of the three issues.

Sixth Issue — Grounds 1, 2, 3 4 — There are un-impeached circumstantial evidence connecting all the respondents to the crime of murder

[55] The second limb of the judgment of the Court of Appeal clearly stated that 'even assuming that the cautioned statements tantamount to confession of murder, there must be other evidence independent of the cautioned statements sufficient to support the conviction of murder. In this case there was no such evidence'.

[56] As we have said above it is quite surprising that having come to such a conclusion the Court of Appeal did not venture to say that the defence should not have been called at the close of the case for the prosecution.

[57] With respect, we do not think such a statement could have been justified. There were ample circumstantial evidence relevant and implicating the respondents to the murder of the deceased. The learned deputy had concisely identified them as thus:

(a) the admission by the first respondent that he was responsible for the ransom notes sent to deceased's family;

(b) the first respondent came to collect the ransom money of RM3,000;

(c) the first respondent led the police to the place where the skeletal remains of the deceased were found; and

(d) the first respondent was the person who sent the flowery pants of the deceased to her family in order to convince them of the seriousness of his demand.

[58] It should also be noted that in addition to the above the respondents in their respective cautioned statements admitted raping the deceased and further admitted that they had every reason not to let her escape otherwise they would be in trouble.

[59] The learned deputy submitted correctly in our view that by 'themselves, those pieces of evidence might not be sufficient to convict the respondents of the crime they were charged but when combined with the cautioned statements of the respondents either taken individually or by

invoking s 30 of the Evidence Act, it would undoubtedly confirmed the guilt of the respondents beyond reasonable doubt'.

Second Issue — Grounds 5 and 12 — There was common intention both to rape and murder the deceased Hew Leh Poh

[60] This issue did not arise in the judgment of the Court of Appeal. There was no necessity since it already held that there was no evidence linking the respondents to the crime other than their impugned cautioned statements.

[61] Anyway the learned deputy went on to submit on this issue. He argued that 'upon a finding of facts that there was a common intention to rape Hew Leh Poh and in furtherance of that common intention the young girl was murdered in order to prevent her from reporting on them (the respondents), the Court of Appeal clearly erred in not directing its attention to the application of s 34 to uphold the conviction of murder imposed on the respondents'.

[62] There is merit to what the learned deputy has submitted and we are inclined to agree. In addition, it is a question of fact whether an act or acts of one or more accused persons in committing an offence was or were done in furtherance of a common intention of all the accused persons. In the present case on this issue the assessors had given their affirmative finding of fact and concurred by the learned trial judge. That should settle it since as we have said above an appellate court should be slow in interfering finding of fact of a trial court.

Third Issue — Ground 6 — There was no necessity to identify who is the actual doer of the offence

[63] On closer scrutiny of the judgment of the Court of Appeal it would appear that the court was looking for a direct link of who actually amongst the respondents did the act or acts of killing the deceased. The court seemed to be quite oblivious of the fact that the respondents were jointly charged with s 34 of the Code invoked. With respect such approach of the Court of Appeal was not quite in tandem with the settled law.

[64] The learned deputy submitted that with s 34 invoked, 'there is no requirement for the prosecution to prove who exactly ultimately caused her death as explained in the case of *Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688 at p 701 that:

> In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v Emperor* AIR 1925 PC 1, the court stated:

A Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

B **[65]** In addition to what we have said in relation to issues 1, 4 and 5 above, we accept what was submitted by the learned deputy as the correct preposition of law.

CONCLUSION

C

[66] We therefore unanimously allowed the appeal by the appellant/prosecution and restored the convictions and the sentences imposed by the learned trial judge upon the respondents.

D **[67]** At the time of rendering the reasons for our decision one member (Dato' Azmel Maamor FCJ) of the panel which heard the appeal had retired. However the remaining members of the panel are unanimous in this grounds of judgment (see *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469).

E

Appeal allowed.

Reported by Kanesh Sundrum

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